ABSTRACT
The issue of whipping punishment under Syariah Law has been publicly debated of late. The said punishment has always been claimed as barbaric. It is also often labelled as ineffective and impractical. Such blatant lies and baseless accusations against its enforcement are often hurled by Muslims themselves unfortunately. Even those who are in ignorance of Syariah Law dare to criticize it. Hence, this article aims at dispelling the above misconceptions. It seeks to prove that whipping punishment under Syariah Law is just, effective and practical if applied strictly in accordance with Syariah principles. It is also observed that lack of proper and correct information on the true fact on Islamic whipping punishment has led to the above misconceptions. Last but not least, this article suggests that serious effort must be made to educate the public on this issue.

Key words: Whipping Punishment, Islamic Criminal Law, Application, Public Awareness JEL Classification: K-14 Criminal Law

Introduction
Basically whipping punishment is of hadd in nature. Such punishment is applied in hadd criminal offences such as adultery and liquor drinking (Abu Zahrah, 1974). In order for the accused to be sentenced to whipping, the prosecution must prove two elements:

- That it is proven beyond reasonable doubt that the accused has indeed committed such offence (Yusoff (Ed.), al Zuhaili, 1992). The Prophet SAW once said that the punishment of hudud is lifted in matters of doubt (IbnRushd, 1995).
- That the accused has committed the offence deliberately and intentionally, he could be subjected to whipping punishment. Allah SWT says in the Quran in Al Ahzab, verse 5 which means: “But there is no blame on you if ye make a mistake therein: (What counts is) the intention of your hearts. And God is Oft returning, most Merciful” (Yusuf Ali, 1938). The Prophet SAW once said in a hadis which means: “There is no obligation on my ummah in matters of mistake, forgetfulness and everything which is forced on him” (al Nubhan, 1988).

Whipping punishment in adultery offence is mentioned in both the Quran and the Sunnah. Indeed adultery is considered in al Isra’, verse 32 as heinous and immoral (Abd. Jalil, 2002; Yusuf Ali, 1938). Hence, it warrants heavy punishments such as stoning and whipping (Yunus, 2003; Mohd Said, 2000). Stoning punishment is meted out to an accused who is married at the time of commission of adultery (Mohd. Iqbal, 1985; IbnRushd, 1995). Meanwhile whipping punishment is meted out to an accused who is a bachelor at the time of commission (IbnRushd, 1995; Yunus, 2003; Paizah Ismail, 1991). Such whipping punishment is generally mentioned in al Nur, verse 2 (Yusuf Ali, 1938). The Sunnah of the Prophet SAW, meanwhile explains further about whipping in adultery cases. The Prophet SAW said to the following effect (Paizah Ismail, 1991) which means:

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“An unmarried adulterer with an unmarried adulteress both will be punished with a hundred whippings and a year in banishment. A married adulterer with a married adulteress both will be punished with a hundred whippings and stoning.”

Even though whipping punishment is originally of ḥudud in nature, the ulama’ are of the opinion that it could also be a punishment in ta’zir offences (HashimMehat, 1991). The only difference is that the number of whipping is much lesser as compared to the number in ḥudud offences (HashimMehat, 1991; Daud Muhammad, 2009). In one of the hadith in Sahih Muslim, Sharh al Nawawi, it was reported by Abu Barda Ansari that the Prophet SAW once said to the following effect which means:

“Whipping punishment (in ta’zir cases) is not supposed to exceed more than ten strokes, except in ḥudud cases which is under the rights of Allah.” (Sahih Muslim, Vol 3, Hadis No: 4234, HashimMehat, 1991).

In another hadith in Bayhaqi, Sunan, reported by Ibn Abbas, the Prophet SAW said to the following effect which means:

“Those who raised the punishment of non ḥudud offences to such a degree reaching the degree of ḥudud punishment are indeed, transgressors.” (Bayhaqi, Al Sunan al Kubra, Vol. VIII, HashimMehat, 1991).

Whipping punishment has come under close scrutiny lately. In Malaysia, the issue has been publicly debated by academicians and non-academicians alike. The public is divided on the issue. Some are in favour of its enforcement while others are against it. Those who are against whipping punishment often claim it as being barbaric, ineffective and impractical. This research hence aims at dispelling the above-said misconceptions against the punishment. In explaining the issue, reference is made to syariah principles and relevant legal provisions under the Syariah Criminal Procedure (Federal Territories) Act 1997 on whipping.

Research Methodologies:

The article adopts a research methodology which is qualitative in nature. As such methodologies adopted in this writing are library research, comparative study and interviews.

- Library research is conducted on relevant materials on whipping punishment. These materials include books and articles written by scholars on the subject. Legal provisions on whipping under the Syariah Criminal Procedure (Federal Territories) Act 1997 are also examined. The main objective of the study is to obtain a clear picture of the concept of whipping punishment under Syariah criminal law.

- This research also conducts a comparative study between the basic Syariah principles on whipping punishment and the provisions on whipping under the Syariah Criminal Procedure Act (Federal Territories) 1997. It also draws a comparison between the above legal provisions and the provisions under Pakistan’s Execution of The Punishment of Whipping Ordinance, 1979 (Ordinance No: IX of 1979). The above comparisons are made to obtain a clearer picture of enforcement of whipping punishment.

- Interviews are also conducted to gauge the level of understanding of the general public on Syariah whipping punishment. Some 235 respondents are interviewed. The respondents come from all walks of life. They come from urban, sub-urban as well as rural areas. Specific questions are asked to test and gauge their understanding on Syariah whipping punishment as well as their perceptions toward it. These respondents are chosen from the states of Kuala Lumpur, Johor, Penang and Pahang. The data and findings obtained are used to support the discussions and arguments on legal provisions pertaining to Syariah whipping punishments.

Whipping Punishment under Syariah Criminal Procedure (Federal Territories) Act 1997:

Legal provisions pertaining to execution of whipping punishment could be found in most Syariah Criminal Procedure Enactments in Malaysia. Section 125 of the Syariah Criminal Procedure Act (Federal Territories) 1997, for instance, spells provisions pertaining to whipping punishment. These provisions are indeed almost identical to that of sections 4, 5, 6 and 7 of the Execution of The Punishment of Whipping Ordinance, 1979 (Ordinance No: IX of 1979), Islamic Republic of Pakistan.

Section 125(2) provides specifications for the actual whip to be used for whipping. It must be made of skin or rattan, smooth and even. It must be not more than 1.22 metre in length and not more than 1.25 in diameter. The main reason of determining the length and diameter of the whip is to ensure that the objectives of punishment, reform and deterrent are achieved without causing unnecessary injury to the convict (Yusoff (Ed), al Zuhaili,1992). Section 125(3) meanwhile provides for other additional guidelines to be followed in enforcement of whipping punishments such as:

- Before the whipping is carried out, the convict must be medically examined by a certified medical officer (section 125(3)(a)). This is to ensure that the convict is in good health to undergo such punishment. The Shafie and Hambali schools of thought give a guideline on this: (i) medical officer must be present to ensure that the whipping punishment does not cause death to the convict; (ii) should the convict be too old or weak, the punishment must be carried out in the manner and in intervals so as to avoid death; (iii) should the convict be...
sick, the enforcement should be delayed until he is certified healthy to undergo such punishment (Yusoff (Ed), Al Zuhaili, 1992);
- Should the convict be a pregnant female, the whipping should be postponed to a date which should be of two months after delivery or abortion (section 125(3)(b));
- The whipping should be carried out in the attendance of a certified medical officer. It must also be carried out at a public premise ascertained by the ruling government (section 125(3)(c)). The Shafie, Malik, Hanafi and Hambali schools of thought are in consensus that such whipping punishment be carried out in public. This, according to the ulama’ is in line with injunction in al Nur verse 2 which means: “…and let the punishment (of whipping) be witnessed by a group of those who have faith” (Yusoff (Ed), Al Zuhaili, 1992);
- The executor performing the whipping must be of just and matured in nature(section 125(3)(d));
- Every stroke of whipping performed by the executor must be moderate in nature (section 125(3)(e)). The executor, in every stroke, must not raise his hand higher than his head. He must also ensure that the skin of the convict does not bleed or get blistered from every given stroke (Yusoff (Ed), Al Zuhaili, 1992);
- For every stroke on the body of the convict, the executor holding the whip must avoid any pulling motion so as to avoid unnecessary injury to the skin and flesh (section 125(3)(f));
- The whipping should be given evenly to the whole convict’s body (so as to avoid unnecessary injury to any particular part) (section 125(3) (g)). However certain body parts should be avoided such as the head, face, stomach, chest and private parts (Hashim Mehat, 1991);
- The convict should be allowed to wear clothes which cover his aurah (section 125(3)(h)) as ordained by the Syariah principle (Yusoff (Ed), Al Zuhaili, 1992);
- The whipping should be performed on a standing male convict, or a sitting female convict (section 125(3)(i));
- j) At any stage of the punishment, should the certified medical officer certifies that the convict is medically unfit or unable to bear the whipping punishment, the punishment should be postponed until he certifies otherwise (section 125(3)(j)).

Section 125(4) meanwhile provides that in cases whereby the convict is punished by whipping only, he must also be detained in the same manner as if he is undergoing a jail sentence. The convict is to be detained until he has received all whippings sentenced. Section 125(5) provides that at any stage of the punishment, should a certified medical officer certifies that the convict, by reason of old age, sickness or others, is unable to undergo the whipping punishment, in whole or in part, such case should be referred to the sentencing court. The said court will then issue a special order which it deems fit (Yusoff (Ed), Al Zuhaili, 1992).

It is to be observed that the above Syariah whipping punishment is just and effective as it sets out to punish and reform the convict while deterring the public from committing the crime. However, in order for the above legal provisions on whipping to have such a just and effective effect, their application must conform strictly to the above basic Syariah principles. It is only then that the three objectives of punishing the convict, reforming him and deterring the public from committing the crime could be achieved. Also its only then that the Syariah whipping punishment will prove to be just and effective. This vision is shared by Datuk Wan Mohammad Sheikh Abdul Aziz, the Director General of JAKIM and Datuk Ismail Yahya, the Chief Syarie Judge of Terengganu. (Daud Muhammad, 2009; Wan Mohammad, 2009).

It should also be noted by all that the Syariah whipping punishment clearly differs from the normal criminal whipping as carried out by Malaysia’s Prison Department in terms of application and enforcement. This is because, the whipping punishment carried out by the Prison Department only focuses on punishing the offender. On the other hand, the Syariah whipping aims at punishing the convict, reforming him and deterring the public from crime commission. (Zulfakar, and Zainul Rijal, 2009).

Misconception and Misunderstanding on Syariah Whipping Punishment in Malaysia:

This research has identified a problem namely the lack of basic understanding on issues pertaining to Islamic whipping. In Malaysia, the public at large is not well informed of the nature and enforcement of such punishment. This has affected their poor perception towards it. First of all, some are of the opinion that Syariah whipping is barbaric, ineffective and impractical. Interviews had been conducted on various respondents from various Internet websites such as Facebook, Hi5 and Tagged. The respondents were asked on their personal understanding and perception on Syariah whipping punishments. From these interviews, 53% claimed that whipping punishment is barbaric, another 67% claimed that it is ineffective while a staggering 77% claimed that such punishment is impractical.

Separate interviews were also conducted on 235 respondents in the streets of Kuala Lumpur, Johor Bharu, Penang and Kuantan. Their views represent the views of the residents of Wilayah Persekutuan Kuala Lumpur, Johor, Penang and Pahang. These respondents were randomly chosen from urban, sub-urban and rural areas. They were asked exactly the same questions as their online counterparts. The results of these interviews were...
equally shattering. 69% of the respondents claimed that whipping punishment is barbaric, another 64% claimed that it is ineffective while 71% claimed that such punishment is impractical.

A closer look at the various reasons given by the respondents to support the above claims revealed the serious lack of understanding on the said punishment. Such lack of understanding has clearly influenced their misconceptions on the matter. As such, this study maintains that there is an urgent need to educate the public well on the true Islamic whipping. Such effort should be made through various channels and mediums of information.

Secondly, some Malaysians feel that the Prison Department will not be able to carry out the Syariah whipping punishment impartially. This is due to the fact that the Prison Department is bound by regulation 131 (2) of the Prison Regulations 2000 (enacted under the Prison Act 1995) which forbids the department from performing whipping punishments on male and female convicts aged 50 and above. Hence, they argue that the scenario will lead to partiality as convicts who are aged 50 years and above are conveniently exempted from the punishment whereas those aged below 50 will be punished. Such a perception is clearly wrong. This is because, regulation 131 (2) of the Prison Regulations 2000 only applies to convicts convicted by the civil courts. For convicts convicted by the Syariah courts, the department is bound by section 125 and section 126 of the states’Syariah criminal procedure enactments which allows the Prison Department to perform Syariah whipping punishments on male and female convicts regardless of their age subject to declaration of medical fitness to undergo such punishments by a certified medical doctor. Thus, the issue of partial punishment will never arise. (Ahmad Azam, 2011)

Dissemination of Information on True Nature of Syariah Whipping:

The ability to disseminate and promote Islamic whipping punishment is an important component of communicating true information about whipping. By disseminating information, both JKSJ (Jabatan Kehakiman Syariah Malaysia) and JAKIM (Jabatan Kemajuan Islam Malaysia) can reach members of its focus group to educate them properly.

The Malaysian public in general should be continuously educated through campaigns, seminars and workshops. More concerted efforts should be made to organize such programmes. It is extremely important to organize such programmes in urban, sub-urban and rural areas. This is to ensure that clear and correct information on Syariah whipping punishment is well disseminated among people from all walks of life.

The Internet can also serve as an invaluable tool in this effort to communicate that information across a wider audience. Information can be disseminated through the use of websites, Social Network Services and relevant blogs designed to promote information relating to whipping for members of the public.

Conclusions and Suggestions:

This article concludes that whipping punishment under the Syariah Criminal Procedure (Federal Territories) Act 1997 generally conforms to the Syariah principles. Should the said punishment be carried out in strict conformity with the principles, the three objectives of punishing the convict, reforming him and deterring the public from committing the crime could be achieved. The main problem here is poor public perception towards the punishment. Such negative perception and misconception are caused by lack of correct and accurate information. It is thus very important to educate the public on the true nature and effectiveness of this punishment. Serious and concerted effort should be made to educate the Malaysian public from various backgrounds through organization of campaigns, seminars as well as workshops. The Internet could also be extremely effective in disseminating correct and clear information on the true Syariah whipping. A special website should be created to educate the local and international population on this. Only then we would be able to remove the misconception pertaining whipping from the public hence, paving the way for proper understanding Syariah.

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